THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Second Appeal No.928 of 2002

JUDGMENT:

This Second Appeal under Section 100 of the Code of Civil Procedure, 1908 by the unsuccessful defendants is directed against the decree and judgment dated 31st July 2002 of the learned Senior Civil Judge, Suryapet of Nalgonda District passed in A.S.No.2 of 1999. The said learned Senior Civil Judge while dismissing the said first appeal had confirmed the decree and judgment dated 18.01.1999 of the learned Junior Civil Judge, Suryapet passed in O.S.No.169 of 1994.

2. I have heard the submissions of the learned counsel for the appellants/defendants ('the defendants', for brevity) and the learned counsel for the respondent/plaintiff ('the plaintiff', for brevity). I have perused the material record.

3. To begin with, it is pertinent to mention that this second appeal was earlier disposed of by this Court by a judgment dated 21.09.2007. However, while allowing the Civil Appeal No.6506 of 2014, by an order dated 15.07.2014, the Hon'ble Supreme Court held as follows:

> **The High Court did not hold that no substantial question of law arose in the second appeal nor did it hold that a substantial question of law did arise, which had to be answered against the appellant. In view of this, and on reading of Section 100 of the CPC, the substantial questions of law, if any, ought to have been framed by the High Court in case it was dealing with the merits of the appeal. Consequently, we have no option but to set aside the order of the High Court and remand the matter back for reconsideration on merits and to frame substantial questions of law, if any, that arise. The High Court may consider expeditious hearing of the second appeal. The Civil Appeal is allowed, in view of the above.**

4. Be it noted that when this second appeal was admitted on 18.11.2002, this Court had framed the following substantial question of law:

> **'Whether the withdrawal of the suit O.S.No.168/86 filed for perpetual injunction earlier by the plaintiffs without the leave of the Court would bar the present suit O.S.No.169/94 or not?'**

Further, when this second appeal came up for hearing on 03.07.2015, this Court after allowing S.A.M.P.No.2445 of 2014, which was filed with a request to frame additional substantial question of law, had framed the following additional substantial question of law:

> **'Whether the judgment and decree dated 31.07.2002 in A.S.No.2 of 1999 are perverse and the same are liable to be set aside?**

On 10.07.2015, as desired by the learned senior counsel, the submissions were heard on the above mentioned additional substantial question only and on the aspect as to whether the second appeal deserves to be allowed straightaway and the first appeal deserves to be remanded to the court below for the reason that there is no appreciation of additional evidence recorded by the Court below. Therefore, now a decision has to be made on the additional substantial question only and it is to be decided as to whether the second appeal should straightaway be allowed without going into the merits of the matter and the decree and judgment of the court below have to be set aside for the limited purpose of remanding the first appeal to the Court below for fresh disposal on merits and in accordance with the procedure established by law after taking into consideration the additional evidence, which was not adverted to, considered and appreciated by the court below while rendering the impugned judgment.

5. Accordingly the following substantial question of law is alone taken up:

> **'Whether the judgment and decree dated 31.07.2002 in A.S.No.2 of 1999 are perverse and the same are liable to be set aside?**

5.1 The learned counsel for the appellants/defendants would submit as follows: 'Before the Court below, both the parties had let in additional oral evidence and also documentary evidence while the first appeal was pending before the court below. In fact, both PW 1 and DW1 were recalled and were further examined and exhibits B9 to B16 and A14 to A19 were marked as is evident from the Appendix of Evidence annexed to the judgment of the court below. But such additional evidence that was adduced before the 1st appellate Court was not at all adverted to, considered and appreciated and

the first appeal was disposed of without making a whisper in regard to the additional evidence adduced. The additional evidence adduced is material evidence. Therefore, the judgment of the 1st appellate Court is perverse for non-consideration of the entire additional evidence adduced before it. Hence, the appeal is to be straightaway allowed and the decree and the judgment of the Court below are to be set aside and the matter has to be remitted to the Court of first appeal for deciding the first appeal afresh and on merits after taking into consideration the additional evidence that was already adduced and is available on record.'

5.2 On the other hand, the learned counsel for the respondent/plaintiff would submit that the evidence adduced is only with regard to revenue records and that the same would not decide title and that the documents exhibited before the Court below were obtained subsequent to the year 2000, whereas the suit was filed in the year 1994 and hence, there is no need to consider the said documents and hence, the non-consideration of the said additional evidence by the Court below is not going to make a difference to the final result of the appeal suit and hence, there is no need to remand the first appeal to the court below for a fresh decision.

5.3 Thus, the learned counsel for both the sides had advanced arguments only on the limited aspect as to whether or not this second appeal should straightaway be allowed and whether or not the first appeal has to be remitted to the court below for fresh disposal on merits since the additional evidence which was taken on file by the Court below was totally ignored by it while rendering the impugned judgment.

5.4 To begin with, be it noted that the sole plaintiff had filed the suit for a declaration that the plaintiff is the owner and possessor of the suit land and for a perpetual injunction. In the suit, the plaintiff had alternatively claimed a relief of restoration of possession of the property in case the court comes to believe that the plaintiff was out of possession. After full-fledged trial, the suit was decreed granting the reliefs of declaration and recovery of possession and also perpetual injunction. The aggrieved defendants had preferred the

first appeal. The 1st appellate Court had permitted the parties to adduce additional evidence. Hence, PW1 and DW1 were recalled and were examined. Exhibits A14 to A19 and exhibits B9 to B16 were marked. The said fact is not in dispute. However, in the judgment of the court below, which is impugned there is not even a reference to the additional evidence adduced let alone evaluation of the same while deciding the issues involved in the *lis*. It is undisputed that the court of first appeal is the last court of fact. Hence, the learned senior counsel for the defendants while contending that the impugned judgment is perverse for non-consideration of material evidence had placed reliance on a decision in **Balai Chandra Hazra v. Shewd hari Jadav**[1]. His submission is that the 1st appellate Court permitted oral and documentary evidence to be adduced and that accordingly, additional oral and documentary evidence was adduced before the 1st appellate court and that thereafter, the 1st appeal was set down for hearing and that ultimately the 1st appeal was dismissed confirming the decree and judgment of the trial Court without even making a whisper or a passing reference to the additional evidence produced by both the parties and that therefore, the decree and judgment of the court below are perverse. He would further submit that it is the lawful duty of the 1st appellate court to refer to, evaluate and appreciate the entire evidence including the additional evidence available on record and record findings on all the issues and that the court below had failed to decide the first appeal accordingly and hence, it is necessary to set aside the decree and judgment which are impugned and remand the first appeal to the Court below for deciding the 1st appeal afresh and on merits after taking into consideration the additional evidence, which is already on record. On the other hand, the learned counsel for the respondent/plaintiff while supporting the decree and judgment of the court below had reiterated that the additional evidence adduced is not material evidence and is not relevant to decide the title and hence, there is no need at all to consider the additional evidence adduced before the 1st appellate court and hence by non-consideration of the said evidence by the 1st appellate court no prejudice was caused to either of

the parties and hence, for non-consideration of the additional evidence, the decree and judgment of the 1st appellate court need not be set aside. He had also placed reliance on the following decisions: (i) **R.V.S.Vara Prasad and others v. Dr.V.Ramdas**[2], (ii) **Shri Inacio Martins, through L.Rs v. Narayan Hari Naik and others**[3], (iii) **Om Prakash Gupta v. Ranbir B.Goyal**[4], (iv) **Govindaraju v. Mariamman**[5], (v) **Balappa Naikappa Naik v. Neelappa Khemappa Kashappagol**[6], (vi) **Chhatar Mahto v. Chito Mahto**[7], (vii) **Parry's (Calcutta) Employee's Union v. M/s. Parry and Co. Ltd.**[8], (viii) **Ashwinkumar K.Patel v. Upendra J. Patel**[9], and (ix) **Laxmidevamma and others v. Ranganath and others**[10]. The said decisions are relied upon in support of the contentions in regard to the merits of the case of the plaintiff, and therefore, there is no need to refer to the facts and ratios in the said decisions, as at this stage, this Court is not going into the merits of the main appeal in view of the limited scope of the additional substantial question of law, which is taken up for determination.

5.5 I have gone through the pleadings and evidence available on record. I have bestowed my attention to the facts and I have given earnest consideration to the facts and submissions. A perusal of the Section 100 of the Code shows that the jurisdiction of the High Court to entertain a second appeal after 1976 amendment is confined only to such appeals that involve a substantial question of law, specifically set out in the memorandum of appeal and formulated by the High Court. Of course, the proviso to the Section shows that nothing shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if the Court is satisfied that the case involves such a question. This Court in the second appeal generally will not appreciate or re-appreciate the oral and documentary evidence unless the appreciation of evidence by the Courts below is perverse and there are other valid reasons warranting such a course.

5.6 Be that as it may. It is necessary to refer to Section 103 of the Code, which reads as under:

> **103. Power of High Court to determine issue of fact:- In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal, --**
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> **(a) Which has not been determined by the lower Appellate Court or both the Court of first instance and the lower Appellate Court; or**
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> **(b) Which has been wrongly determined by such Court of Courts by reason of a decision on such question of law as is referred to in Section 100".**

As per the above provision, in any second appeal, the High Court may, if the evidence brought on record is sufficient, determine any issue necessary for the disposal of the second appeal, though such an issue has not been determined by the lower appellate Court or both the Court of first instance and the lower appellate Court or such an issue has been wrongly determined by such Court or Courts. A reading of the provision of law would show that if the evidence on record is sufficient, the High Court may determine any issue necessary for the disposal of the second appeal if only an issue has not been determined or wrongly determined by either of the courts below or both the courts. In the case on hand, the court below determined the issues but, without adverting to and considering the material evidence, viz., additional evidence in the form of both oral and documentary evidence. As rightly urged, the Court of first appeal being the last court of fact, a duty is cast upon the court below to weigh the evidence on record afresh and give its own findings independently of the findings of the trial court. When the decision of the 1st appellate court was made without adverting to the evidence and by ignoring the additional evidence it would amount to perversity. The law is well settled that non-consideration of evidence of vital nature is a ground for High Court's interference. Therefore, this Court is of the well considered view that the judgment that was rendered by the court below without adverting to and considering the additional evidence is unsustainable being perverse, irregular and illegal. It is needless to mention that the additional evidence was not before the trial court and hence, when the judgment was rendered by

the trial court, there is no scope for it to consider the said evidence. Even though the additional evidence was available on record, the same was not even adverted to in the judgment impugned by the court below due to oversight or mistake or for some reason or the other. Since the Court below had totally ignored additional evidence that was brought on record and had disposed of the appeal without a whisper about the said additional evidence, it is obvious that the additional evidence was not weighed, evaluated and appreciated by any one of the courts below. In the second appeal under Section 100 of the Code, considering the narrow scope of the provision, this Court has to consider only the substantial questions of law and cannot decide all the issues involved in the *lis*. Hence, it is just and fair to set aside the decree and the judgment of the court below. The second appeal accordingly succeeds on the additional substantial question of law.

6. In the result, the second appeal is allowed setting aside the decree and judgment of the court below; and, the 1st appeal in A.S. No. 2 of 1999 on the file of the learned Senior Civil Judge, Suryapet of Nalgonda District is remitted to the said Court for deciding the first appeal afresh and on merits after weighing and appreciating the entire evidence including the additional evidence. Since the suit is a very old suit, the court below shall complete the exercise and decide the first appeal as directed within one month from today. The costs of this appeal shall abide by the result of the first appeal.

Miscellaneous petitions, if any, pending in this appeal shall stand closed.

M. SEETHARAMA MURTI, J

19th August 2015

Note:- Issue CC by 24-08-2015
(B/o)
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[1] AIR 1978 SUPREME COURT 1062

[2] 2003(3) ALD 566 (DB)

[3] AIR 1993 SUPREME COURT 1756

[4] AIR 2002 SUPREME COURT 665

[5] AIR 2005 SUPREME COURT 1008

[6] AIR 2003 KARNATAKA 320

[7] AIR 1967 PATNA 378

[8] AIR 1966 CALCUTTA 31

[9] (1999) 3 Supreme Court Cases 161

[10] (2015) 4 Supreme Court Cases 264